Supreme Court, U.S.
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No. 95-579

In The

Supreme Court of the United States

October Term, 1995

DR. BARBARA LEE PERLMUTTER, et al.,

Petitioners,

v.

MICHAEL COOPER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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12 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

FEDERAL RULE INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

POINT I – TO THE EXTENT PETITIONER INTENDS TO SEEK CERTIORARI AS TO ANY CLAIMS CONCERNING THE BVES DEFENDANTS, THEY ARE NOT PROPERLY BEFORE THIS COURT 4

POINT II – THE BLOOMFIELD VOLUNTEER EMERGENCY SQUAD IS NOT A STATE ACTOR FOR THE PURPOSE OF 42 U.S.C. §1983 6

A. AS A VOLUNTEER AMBULANCE SQUAD, BVES WAS NOT A STATE ACTOR EVEN THOUGH IT RECEIVED SOME SUPPORT FROM THE MUNICIPALITY 6

B. BVES' COOPERATION WITH THE BLOOMFIELD POLICE DID NOT MAKE IT A STATE ACTOR 8

TABLE OF AUTHORITIES

Page

Federal Cases

Blum v. Yeretsky, 457 U.S. 179 (1982) 7

Civil Rights Cases, 109 U.S. 18 (1883) 6

Community Medical Center v. Emergency Medical Services, 712 F.2d 878 (3d Cir. 1983) 6, 7

Groman v. Township of Manalapan, 47 F.3d 628 (3d Cir. 1995) (although financially assisted by the municipality, first aid squad was not a state actor) 7

Krieger v. Bethesda-Chevy Chase Rescue Squad, 599 F. Supp. 770 (E.D. Va. 1983) 8

Luger v. Edmonston Oil, 457 U.S. 922 (1982) 6

McKinney v. West End Voluntary Ambulance Association, 821 F. Supp. 1013 (1992) 7

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 7

Federal Statute

42 U.S.C. §1983 ..... 1, 3, 6

FEDERAL RULE INVOLVED

In addition to the provisions cited in the Petition, the following Local Rule of the District of New Jersey is relevant:

> Rule 12I – *Motions for Reargument* – A motion for reargument shall be served and filed within 10 days after the entry of the order or judgment on the original motion by the Judge or Magistrate. There shall be served with the notice a brief setting forth concisely the matters or controlling decisions which counsel believes the Judge or Magistrate has overlooked. . . .

STATEMENT OF THE CASE

This Brief is filed on behalf of the Bloomfield Volunteer Emergency Squad and volunteer Squad members Fred Menzel and Andrew Depczek (hereinafter the "BVES defendants"). The procedural history of the claims against these defendants is recited here because it demonstrates that they are not properly before this Court and that the claims against them have been treated with ambivalence by Petitioner throughout this litigation.

Summary Judgment was granted as to the BVES defendants by the Honorable John W. Bissell, J.U.S.D.C. on November 18, 1993, upon a finding that BVES was not sufficiently connected to the Township of Bloomfield to be a state actor for purposes of 42 U.S.C. §1983. (App. 12-15)[1]. Pendent state law claims against the BVES

[1] All citations to App. ___ are to Petitioner's Appendix.

defendants were dismissed without prejudice and are now pending before the Superior Court of New Jersey, Law Division. BVES is a private, not-for-profit corporation under New Jersey law which is controlled by its own board of trustees with a squad captain responsible for day to day operations.

All proceedings regarding these defendants subsequent to this initial grant of summary judgment stem from a single sentence in a brief filed on February 14, 1994, in opposition to co-defendants' subsequent motions for summary judgment. That sentence said simply: "[p]laintiff respectively requests that the Court reconsider its prior ruling granting summary judgment in favor of the BVES defendants." No proper motion for reconsideration was made and no additional reasons or arguments were provided as to why reconsideration was appropriate.

In its decision dated June 7, 1994 granting the Mountainside co-defendants' motion for summary judgment, the District Court found that this single sentence did not come close to complying with the applicable procedural and substantive requirements for a motion for reconsideration. (App. 50) Summary judgment was granted to all remaining defendants by this order and by another order bearing the same June 7 date. (App. 37-38; App. 52-54)

Petitioner then retained new counsel and filed a formal motion for reconsideration. This motion sought reconsideration of the entirety of both June 7 orders, apparently including the prior denial of reconsideration as to the BVES defendants, although plaintiff included no

argument as to those defendants and did not even address the issue of how reconsideration could be appropriate nearly a year after summary judgment had been granted. Petitioner's motion for reconsideration was denied by opinion and order dated August 23, 1994. (App. 55-65) This order is the subject of plaintiff's present Petition to this Court, having been affirmed by the Third Circuit (App. 1-3).

Notably, the District Court's order of August 23, which is the subject of the present Petition, did not purport to address any motion for reconsideration concerning the BVES defendants. (App. 52-54) Nevertheless, Petitioner did include these defendants in her brief before the Third Circuit, arguing that they had acted in concert with the police so as to be state actors under 42 U.S.C. §1983. This argument was apparently rejected by the Third Circuit on either substantive or procedural grounds, because that Court affirmed the District Court's decision for substantially the reasons set forth in Judge Bissell's opinion. (App. 1-3) Now, before this Court, Petitioner has again omitted any argument as to the BVES defendants.

REASONS FOR DENYING THE WRIT

POINT I

TO THE EXTENT PETITIONER INTENDS TO SEEK CERTIORARI AS TO ANY CLAIMS CONCERNING THE BVES DEFENDANTS, THEY ARE NOT PROPERLY BEFORE THIS COURT

Petitioner is seeking this Court's review of the Third Circuit's affirmance of the District Court's order of August 23, 1994, which denied reconsideration of two prior orders, both dated June 7, 1994. Initially, it should be noted that neither the District Court's August 23, 1994 Order nor the Petition filed with this Court address the issue of the BVES defendants. Thus, it is uncertain whether Petitioner even intends to seek this Court's review of any matters concerning those defendants. To the extent she does so intend, her request concerns an Order denying reconsideration of another order denying reconsideration and does not raise any issues which are appropriate for this Court's review.

The District Court's Order of August 23, 1994 denied reconsideration of two orders dated June 7, 1994. The opinion accompanying one of those two orders (App. 48-50), although not the order itself (App. 52-54), denied an obviously insufficient one-sentence motion for reconsideration of a November 18, 1993 Order granting summary judgment to the BVES defendants. (App. 16-18) Petitioner's papers in support of the August 23, 1994 motion did not even address BVES or the portion of the June 7th opinion denying reconsideration. Nevertheless, since she did not differentiate that she was seeking reconsideration of only parts of the June 7 decisions, the BVES

defendants were compelled to respond, although it was unclear as to whether any relief was, or could have been, sought against them. Thus, at most, the August 23 order now before this Court was, as to BVES, a denial of a motion for reconsideration of a prior denial of reconsideration.

These defendants were originally granted summary judgment by Order dated November 18, 1993. (App. 16-18) Since then, Petitioner has continued to include them in her various appeals and motions without argument or a statement of reasons. The only argument concerning the BVES defendants since they were initially granted summary judgment was in Petitioner's brief before the Third Circuit, where she argued that they had acted so closely with the police defendants that they should be considered state actors. The propriety of the failure to grant reconsideration of the November 18, 1993 opinion, the actual subject of the appeal as to these defendants, has never been addressed.

Now, on petition for writ of certiorari, Petitioner has simply ignored the BVES defendants altogether. They are not the subject of either of her Questions Presented For Review, both of which deal with standards for police liability. Similarly, no argument is made against them in Petitioner's Legal Argument and no wrongdoing on their part asserted in her Statement of the Case. For these reasons, if indeed Petitioner does intend to include the BVES defendants in her Petition, certiorari should be denied.

POINT II

THE BLOOMFIELD VOLUNTEER EMERGENCY SQUAD IS NOT A STATE ACTOR FOR THE PURPOSE OF 42 U.S.C. §1983

To the extent the Petition is interpreted encompass the summary judgment granted to the BVES defendants on November 18, 1993, or the failure to grant reconsideration of that decision on June 7, 1994 and August 23, 1994, certiorari should be denied, since the District Court correctly decided that BVES did not act "under color of state law" so as to subject it to liability under 42 U.S.C. §1983.

A. AS A VOLUNTEER AMBULANCE SQUAD, BVES WAS NOT A STATE ACTOR EVEN THOUGH IT RECEIVED SOME SUPPORT FROM THE MUNICIPALITY.

Although "state action" has been required for liability under §1983 since the time of the *Civil Rights Cases*, 109 U.S. 18 (1883), there is no single "test" for determining whether the conduct of a particular private individual may fairly be attributed to the state. *See, Luger v. Edmonston Oil*, 457 U.S. 922, 939 (1982). The determination is necessarily fact-bound and a number of different approaches have been developed to encompass the myriad forms of state involvement in private activity. *Id.; Community Medical Center v. Emergency Medical Services*, 712 F.2d 878 (3d Cir. 1983).

BVES is a private non-profit corporation organized under the laws of the State of New Jersey. (App. 13) Control is vested in a Board of Trustees and it is not subject to the management or control of the Township of

Bloomfield or its police department. (App. 13-14) Although some financial support is received from the municipality, all the members of BVES are volunteers and raise money to support its operations and the purchase of equipment.

BVES does lease space from the municipality and share dispatch services with the Police Department, but, as the District Court found, that is not a sufficient nexus to make the BVES defendants state actors. (App. 14-15) The receipt of state funding, even when coupled with substantial regulation, does not convert private action into state action. *E.g., Groman v. Township of Manalapan*, 47 F.3d 628 (3d Cir. 1995) (although financially assisted by the municipality, first aid squad was not a state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school receiving 90% of funds from state); *Blum v. Yeretsky*, 457 U.S. 179 (1982) (nursing homes caring for Medicaid patients).

Neither does BVES engage in functions which are "traditionally the exclusive prerogative of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). The provision of emergency medical services has consistently been held, in the Third Circuit and in others, to fall outside the ambit of this "public function" test. *See, Community Medical Associates v. Emergency Medical Services*, 712 F.2d 878, 881-882 (3d Cir. 1983); *McKinney v. West End Voluntary Ambulance Assn.*, 821 F.Supp. 1013, 1019 (1992) and cases from other jurisdictions cited therein.

B. BVES' COOPERATION WITH THE BLOOMFIELD POLICE DID NOT MAKE IT A STATE ACTOR.

Petitioner argued before the Third Circuit that the "working relationship" between BVES and the Bloomfield Police Department revealed that these defendants were "acting in concert." In support of this conclusion, Petitioner cited to deposition testimony indicating only that no one single group was in charge of all aspects of this scene, but, instead, they used a "team approach" in which each group was responsible for its area of expertise. This is not in any way indicative of the type of conspiracy which would fairly attribute a private party's actions to the state for purposes in §1983, but rather involves nothing more than the ordinary level of cooperation necessary for several groups to effectively respond to a medical emergency. In this respect it is similar to *Krieger v. Bethesda-Chevy Chase Rescue Squad*, 599 F.Supp. 770, 773-774 (E.D. Va. 1983) in which the plaintiff asserted that the defendant rescue squad was a state actor because it assisted the fire department in the traditional public function of firefighting by providing emergency lighting and power. The court found that, obviously, not every level of support or assistance would bring a private actor within the traditional public function of firefighting, and noted that "[o]therwise, we might all be firemen."

Similarly, the BVES defendants did nothing more than cooperate with the police in a manner that would be expected in any type of emergency situation. This expected cooperation does not transform them, in effect, into policemen subject to liability as if they were a state actors. There is no evidence that the BVES volunteers

conspired or reached any meeting of the minds at the scene to deprive Ann Perlmutter of her civil rights. The members of BVES were under the control of their supervising officers on the Squad, and there is no evidence that they ever came under the control of the Township of Bloomfield or the Police Department. Each group worked in its area of expertise, none in charge of the other. The mere fact that they cooperated rather than interfered with each other does not render their actions part of a conspiracy.

CONCLUSION

For the foregoing reasons, the Petition of Dr. Barbara Lee Perlmutter for Writ of Certiorari should be denied.

Respectfully submitted,

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